

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TOUCHSTREAM TECHNOLOGIES, INC.

* June 15, 2022

VS.

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* CIVIL ACTION NO. W-21-CV-569

GOOGLE LLC

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BEFORE THE HONORABLE ALAN D ALBRIGHT
MARKMAN HEARING (via Zoom)

APPEARANCES:

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02:31 1 (Hearing begins.)

02:31 2 DEPUTY CLERK: A civil action in Case
02:31 3 6:21-CV-569, Touchstream Technologies, Inc. versus
02:31 4 Google LLC. Case called for a Markman hearing.

02:31 5 THE COURT: If I could have announcements
02:31 6 from counsel, please.

02:31 7 MR. DYKAL: Yeah. This is Ryan Dykal
02:31 8 with Shook, Hardy & Bacon on behalf of Touchstream.

02:31 9 MR. BERGSTEN: Jordan Bergsten from
02:31 10 Shook, Hardy & Bacon on behalf of Touchstream.

02:31 11 MR. LAROQUE: And Sam LaRoque also from
02:31 12 Shook Hardy & Bacon on behalf of Touchstream.

02:32 13 MR. DYKAL: Your Honor, if it's okay, I
02:32 14 think we have a few summer associates that are going to
02:32 15 watch the hearing today.

02:32 16 MR. JONES: And, Your Honor, on behalf of
02:32 17 Google, you have Greg Lanier, Evan McLean and Edwin
02:32 18 Garcia, as well as myself, Mike Jones.

02:32 19 And also attending the hearing is a
02:32 20 corporate representative from Google, Ms. Emily Chen.

02:32 21 And we're ready to proceed, Your Honor.

02:32 22 THE COURT: Good afternoon. How are you
02:32 23 doing?

02:32 24 And welcome to the corporate
02:32 25 representative.

02:32 1 Give me -- my understanding is we have a
02:32 2 motion to dismiss to take up first. And so you know,
02:32 3 we're a full-service court. We are calling from Del
02:32 4 Rio, Texas. So if you haven't been to Del Rio, you
02:32 5 should come down here and see it for yourself. Come
02:32 6 see Lake Amistad.

02:32 7 So I'm happy to take up the motion for
02:33 8 summary judgment.

02:33 9 MR. LANIER: Thank you, Your Honor. Greg
02:33 10 Lanier of Jones Day. And we thank the Court for taking
02:33 11 the time during -- we know it's a travel week and a
02:33 12 busy week, so we appreciate being heard.

02:33 13 My partner Evan McLean will address the
02:33 14 motion to dismiss when Your Honor's ready.

02:33 15 THE COURT: I'm ready. Any time. Yes.

02:33 16 MR. LANIER: All right. Thank you.

02:33 17 Mr. Mclean?

02:33 18 MR. MCLEAN: Thank you, Your Honor. Evan
02:33 19 McLean from Jones Day on behalf of Google. And thanks
02:33 20 for the opportunity to allow us to address our motion
02:33 21 to dismiss. We're arguing multiple issues. We'll try
02:33 22 to make this quick per your Court's preference --

02:33 23 (Clarification by Reporter.)

02:33 24 MR. MCLEAN: Apologies. Apologies.

02:33 25 So today we're going to be arguing that

02:33 1 Google's motion to dismiss Touchstream's willful
02:33 2 infringement claims. And specifically we'll be
02:33 3 focusing as to the pre-suit willfulness claims.

02:34 4 We also argue in our brief with respect
02:34 5 to post-suit willfulness and injunction claims. We'll
02:34 6 just plan to rest on our papers to save time here and
02:34 7 just really focus on those pre-suit willful claims.

02:34 8 Touchstream's claim for pre-suit willful
02:34 9 infringement should be dismissed because allegations in
02:34 10 the complaint fail to address both forms of knowledge
02:34 11 that are required by this Court. Particularly, the
02:34 12 complaint lacks any allegations related to Google's
02:34 13 knowledge of the purported infringement of the asserted
02:34 14 patents.

02:34 15 To successfully plead willful
02:34 16 infringement and particularly important here for
02:34 17 pre-suit willful infringement, the Court has previously
02:34 18 held that the plaintiff must sufficiently allege that
02:34 19 the accused infringers --

02:34 20 (Clarification by Reporter.)

02:34 21 MR. MCLEAN: -- knew of the
02:34 22 patent-in-suit -- sorry. That the defendant knew of
02:34 23 the patent-in-suit. And then after acquiring that
02:34 24 knowledge, it infringed the patent. And in doing so,
02:34 25 it knew or should have known that its conduct amounted

02:34 1 to infringement of the patent.

02:34 2 And the Court adopted this previously in
02:34 3 Parity Networks and has reaffirmed that standard
02:35 4 multiple times, including more recently in a case in, I
02:35 5 believe, February of the BillJCo v. Apple. And
02:35 6 consistent with the Twombly Iqbal standard for 12(b)(6)
02:35 7 motion, plaintiff should plead willfulness with
02:35 8 sufficient articulation of the relevant facts.

02:35 9 Accordingly, important here this
02:35 10 standard, as the Court has articulated multiple times,
02:35 11 contains two distinct forms of knowledge. That is,
02:35 12 knowledge of the patent and knowledge of an
02:35 13 infringement of those patents.

02:35 14 So here Touchstream's allegations are
02:35 15 really all directed to the first type of knowledge.
02:35 16 That is, Google's purported knowledge of the asserted
02:35 17 patent. And while Google doesn't concede that
02:35 18 Touchstream is successful in these allegations, the
02:35 19 Court not even reach that conclusion.

02:35 20 Instead, Touchstream's complaint is
02:35 21 absent of any real allegations regarding the second
02:35 22 type of knowledge. That is, Google's knowledge of a
02:35 23 purported infringement of the patent.

02:35 24 Per Touchstream's opposition brief,
02:35 25 willfulness allegations are really centered around two

02:35 1 particular sets of facts.

02:35 2 First, that Google, during patent
02:36 3 prosecution of some of its own patents, cited to the
02:36 4 asserted patents multiple times --

02:36 5 (Clarification by the reporter.)

02:36 6 MR. MCLEAN: The first set of facts are
02:36 7 that Google, during the patent prosecution of its own
02:36 8 patents, cited to the asserted patents in several of
02:36 9 those patents.

02:36 10 And in the second set of facts,
02:36 11 Touchstream's technology was purportedly famous and in
02:36 12 press releases and for publicity announced that they
02:36 13 had patents on their technology.

02:36 14 This is Touchstream's focus for the most
02:36 15 part in their complaint. And while they do argue in
02:36 16 addition to these two sets of facts that they may be
02:36 17 hiding by some business meetings between the parties
02:36 18 that occurred prior to any issuance of the patents and
02:36 19 the release of the accused product, that the primary
02:36 20 focus is on these patent citations and the purported
02:36 21 publicity.

02:36 22 But again, these allegations are centered
02:36 23 on knowledge of the patents, not knowledge of Google's
02:36 24 purported infringement of those patents.

02:36 25 There are no comparable allegations with

respect to Google's knowledge purported for -- for
respect to the infringement type of knowledge.

Now, inapposite to the motion,
Touchstream claims that Google should have known of its
purported infringement because it purportedly knew
about the patent and had an infringing product.

But this statement is conclusory and the
complaint doesn't explain how Google knew or should
have known about its purported infringement. Instead,
really, Touchstream is collapsing these two types of
knowledge into one type -- into one knowledge and --
which is contrary to this Court's pleading standard.

And as I mentioned previously, recently
the Court did address this -- a similar situation in
BillJCo v. Apple, which came out, I believe, in
February, which was after Google filed its motion.

In that case, the plaintiff primarily
alleged that, like here, the defendant cited the
asserted patents during patent prosecution. And then
the plaintiff later sent a notice letter to the
defendant identifying the patents the defendant
purportedly infringed.

In that case, the Court found the
allegations insufficient because while the defendant
may have had knowledge of the patents, knowledge of

02:38 1 infringement of the patents was a separate requirement
02:38 2 which was not satisfied there.

02:38 3 And while we acknowledge that the Court
02:38 4 found that notice letter was not sufficiently pled
02:38 5 within the complaint in itself, it is no different here
02:38 6 where the plaintiff has provided no notice to Google
02:38 7 that it was purportedly infringing this patent.

02:38 8 Accordingly, like in BillJCo and the
02:38 9 other cases that Google has cited in its brief, which
02:38 10 we won't go into detail because they're all in the
02:38 11 papers, Touchstream's pre-suit willfulness claims
02:38 12 should also be dismissed here.

02:38 13 Thank you, Your Honor.

02:38 14 THE COURT: A response?

02:38 15 MR. BERGSTEN: Thank you. Jordan
02:38 16 Bergsten for the plaintiffs.

02:38 17 So the facts that have been alleged here
02:38 18 as to willfulness takes this case beyond the typical
02:38 19 patent case. There are powerful facts that show
02:38 20 Google's knowledge, not only of our patents, but of
02:39 21 their infringement of our patents, given the
02:39 22 information they were given directly and the
02:39 23 information shown in this new and fairly small industry
02:39 24 about how these patents applied to Touchstream's own
02:39 25 product that was available first in the market and

02:39 1 later, with Google's knowledge, to the Chromecast
02:39 2 accused product and functionalities that came out in
02:39 3 2013.

02:39 4 And we think these facts are certainly
02:39 5 enough to allow discovery on willfulness issues, which
02:39 6 at this point is ongoing. Both parties have served
02:39 7 discovery on each other. And also to deny Google's
02:39 8 claim that this should be dismissed since the issue has
02:39 9 been fully briefed and is being argued today. And we
02:39 10 don't think our client should have to, you know, refile
02:39 11 and take this issue up and have to brief it, given that
02:39 12 the facts are sufficient now.

02:39 13 And I would like to lay out the timeline
02:39 14 a little bit of these specific facts and how they tie
02:40 15 together, because I think it's helpful. It was in
02:40 16 early December that Touchstream came out into the
02:40 17 market with its patented -- it wasn't patented at the
02:40 18 time, but patent pending, second-screen app and product
02:40 19 for casting video from a cell phone to a second screen
02:40 20 and related activities.

02:40 21 As we alleged in our complaint,
02:40 22 Paragraph 34, it was at least as of December of 2011
02:40 23 when Touchstream, at every opportunity it could, told
02:40 24 people that a patent is pending on this second-screen
02:40 25 casting technology that we have out in the market.

02:40 1 They said it when they met with people. They put out
02:40 2 press releases. And there was a lot of industry buzz,
02:40 3 not only about the quality of Touchstream's product
02:40 4 that was out at the time, but also the fact that they
02:40 5 had a patent pending on it. The media was picking this
02:40 6 up and reporting it as well.

02:40 7 About a year later, in December of 2011,
02:41 8 as alleged in Paragraphs 39 and 41 of the complaint,
02:41 9 Touchstream met with Google. Touchstream presented to
02:41 10 Google our patent pending technology on casting
02:41 11 technology and sending to a second screen. We showed
02:41 12 them how the technology worked. We told them that a
02:41 13 patent was pending on it.

02:41 14 And so they saw our technology, which as
02:41 15 the complaint lays out, is the same as theirs. Because
02:41 16 they both practice the patented technology under our
02:41 17 assertions.

02:41 18 And so when we told them that our
02:41 19 technology practices what we're getting a patent on,
02:41 20 and they knew, or at least after that developed, what
02:41 21 they were going to release to the market, they knew the
02:41 22 similarities and that the patent that was pending would
02:41 23 apply to both.

02:41 24 Fast forward to January of 2013, and we
02:41 25 allege this in Paragraph 35, the first patent issued.

02:41 1 And we released a press release on it. And the media
02:42 2 took this up too and reported on this as well.

02:42 3 And in something that was such a new
02:42 4 industry and a small industry, that we now know Google
02:42 5 was trying to get into, it's completely plausible that
02:42 6 Google, you know, having been told that a patent was
02:42 7 pending on our exact solution that we showed them, that
02:42 8 is what they later came out with, that they would have
02:42 9 learned about this actual patent.

02:42 10 And, in fact, under our allegations, we
02:42 11 know they did learn about the patent.

02:42 12 If -- we're now looking to Page 10 of the
02:42 13 complaint, starting in March of 2013, which is months
02:42 14 before they ever released their Chromecast patent -- or
02:42 15 their Chromecast product, Google started citing our
02:42 16 issued patent, not the application but the issued
02:42 17 patent to our inventor Mr. Strober in their own patent
02:42 18 applications in early 2013.

02:42 19 This is Page 10 of the complaint at
02:42 20 bullet, you know, 9 or IX.

02:42 21 And the title of the patent that Google
02:42 22 cited it for, is it irrelevant to the subject matter of
02:43 23 the Chromecast? No.

02:43 24 The title of their patent on which they
02:43 25 cited on the face of it, our issued patent was titled

02:43 1 "Interfacing a television with a second device."

02:43 2 And so just looking at the titles, which
02:43 3 are in our complaint, you can see it's the same
02:43 4 technology we presented to them as patent pending and
02:43 5 the same technology they later released in the
02:43 6 marketplace.

02:43 7 And sure enough, later in July 2013,
02:43 8 about four months after they started these patent
02:43 9 citations, Google released the Chromecast. And that's
02:43 10 Paragraph 45 of our complaint.

02:43 11 So now we know they had seen our
02:43 12 technology that we think is the same and we allege is
02:43 13 the same and had been told that that was patent
02:43 14 pending. They've already told the patent examiner that
02:43 15 they know that we have an issued patent and that they
02:43 16 know that it's relevant to second-screen technology
02:43 17 and, in fact, the technology they're working on and
02:43 18 trying to get a patent on.

02:43 19 And despite all of this, they did not get
02:43 20 a license from us and they released their Chromecast
02:43 21 product, that's now accused of infringement, in July of
02:44 22 2013.

02:44 23 And so we think each of these facts is
02:44 24 powerful, but we think that putting them all together
02:44 25 really puts them to be the -- there's no case that's

02:44 1 exactly like this, but we think as laid out in the case
02:44 2 citations in our brief, that when you pull all of this
02:44 3 together and connect the plausible inferences, as we're
02:44 4 supposed to do at this point, that willful infringement
02:44 5 pre-suit has been sufficiently alleged such that we
02:44 6 should be able to continue doing discovery.

02:44 7 And, in fact, Google's motion should be
02:44 8 denied so that we don't have to take this up again
02:44 9 later in discovery.

02:44 10 Thank you.

02:44 11 THE COURT: A rebuttal?

02:44 12 MR. MCLEAN: Thank you, Your Honor. Just
02:44 13 a couple quick points.

02:44 14 It's important -- and they did mention
02:44 15 these meetings, but it's important to know at the time
02:44 16 of those meetings there was no issued patent and there
02:44 17 was no released products. At the time it was any sort
02:44 18 of communication or knowledge would be premature.

02:44 19 And again, all this information is just
02:44 20 with respect to Google's potential knowledge of the
02:45 21 patents themselves. That is, patents being cited by
02:45 22 other patents. Patents being identified within a press
02:45 23 release which, you know, again, there's no evidence
02:45 24 that Google actually saw those press releases. They're
02:45 25 just generally out there in the public.

02:45 1 But, again, even then Google would have
02:45 2 no knowledge that it was actually infringing these
02:45 3 patents just because -- even if they knew about the
02:45 4 patents, which we don't concede that they initially
02:45 5 did.

02:45 6 So even putting all those facts together,
02:45 7 again, some of which were premature and didn't happen
02:45 8 before a patent was released or product was released.
02:45 9 And then even over those years, there was, again, no
02:45 10 formal notice provided to Google. There was no letter
02:45 11 which, you know, we often see in these patent cases
02:45 12 that was sent to Google, by the way, we have these
02:45 13 patents and we think you're infringing the patents,
02:45 14 providing claim charts or what have you, that lays out
02:45 15 such infringement. That isn't the case here.

02:45 16 It's really just this idea that there are
02:45 17 patents cited by the patents and patents in press
02:45 18 releases. So in that case Google would have no way of
02:45 19 knowing that they were infringing these patents, even
02:45 20 if they had knowledge of them.

02:45 21 Thank you, Your Honor.

02:46 22 THE COURT: You bet. I'll be back in
02:46 23 just a second.

02:46 24 (Pause in proceedings.)

02:48 25 THE COURT: If we could go back on the

02:48 1 record.

02:48 2 The Court is going to deny the motion.
02:48 3 I'll tell you that -- just so everyone's on notice --
02:48 4 in just the last trial we had that finished last week,
02:48 5 after I'd heard all the evidence I did grant a motion,
02:48 6 a directed verdict motion, with respect to the
02:48 7 willfulness claim.

02:48 8 And I think that on something like this,
02:48 9 where you all are at in discovery, I think that's
02:48 10 probably the more appropriate time to take it up. I'll
02:48 11 have heard all the evidence and we can do it
02:48 12 retrospectively then. And the plaintiff can tell me
02:48 13 what they think they've put into evidence, and I can
02:48 14 make an assessment at that time whether or not to let
02:48 15 the jury have it.

02:48 16 So let's turn to the Markman. Give me
02:48 17 one second.

02:49 18 (Pause in proceedings.)

02:49 19 THE COURT: Regan's telling me that
02:49 20 there's post-suit willfulness and also injunctive
02:49 21 relief.

02:49 22 I'm happy to take that up as well.

02:49 23 MR. LANIER: Your Honor, we're prepared
02:49 24 to submit on the papers on those two issues.

02:49 25 THE COURT: Okay. I'm going to deny

02:49 1 those as well.

02:49 2 Let's turn to the Markman. And but let
02:49 3 me -- again, I don't know why I'm feeling -- being
02:49 4 prophylactic today.

02:49 5 As everyone knows, I'm not a big fan --
02:49 6 if the only thing one has is post-lawsuit evidence,
02:49 7 that's usually not very strong evidence in my opinion.
02:49 8 I'm not going to dismiss it at this time, but I'm also
02:49 9 not changing my general belief that as long as a
02:49 10 defendant vigorously defends themselves during the
02:50 11 course of the litigation after receiving the lawsuit,
02:50 12 that that's -- there's usually -- it would be tough to
02:50 13 persuade me there's willfulness just -- if that's the
02:50 14 only evidence that there is.

02:50 15 So let me pull up the Markman. It's not
02:50 16 on my phone. I'm going to lose you on the screen for
02:50 17 just a second while I use my computer. I'll be right
02:50 18 back.

02:50 19 (Pause in the proceedings.)

02:50 20 THE COURT: Okay. We're going to take up
02:50 21 "video file" and "video content," and I'll hear from
02:51 22 the defendant, please.

02:51 23 MR. LANIER: Thank you, Your Honor. Greg
02:51 24 Lanier of Jones Day.

02:51 25 We've divided up the terms, and so Edwin

02:51 1 Garcia who's on the line will take up Term No. 2.

02:51 2 THE COURT: Are you doing that just
02:51 3 because you're not in the room that has the guitar and
02:51 4 you feel that may have lost a little advantage?

02:51 5 MR. LANIER: Your Honor will have to
02:51 6 accept my representation that there's a guitar in the
02:51 7 case on the floor behind me.

02:51 8 THE COURT: Okay.

02:51 9 MR. LANIER: So I wouldn't go too far
02:51 10 without one, like Mr. Dykal.

02:51 11 Thank you, Judge.

02:51 12 Mr. Garcia, please.

02:51 13 MR. GARCIA: Thank you, Your Honor.

02:51 14 We appreciate the Court's tentative
02:51 15 construction, so we instead will attempt to focus today
02:51 16 really on the term "video content" and also on the
02:51 17 "video file."

02:51 18 Can we please get to the next slide?

02:51 19 Next slide, please.

02:51 20 So to put the claim into context, the
02:52 21 claim recites video file and recites video content.
02:52 22 The specification never uses the term "video content."
02:52 23 The term "video file" appears in the specification.
02:52 24 This term "video" on its own appears in the
02:52 25 specification. The term "content" appears in the

02:52 1 specification on its own. "Data file," "file." And so
02:52 2 does "video data" appears in the specification. But
02:52 3 "video content" never does. So it's important to keep
02:52 4 in mind.

02:52 5 Now, the claim itself sets up how these
02:52 6 two terms are supposed to be connected. But yet it
02:52 7 doesn't explain how they are used together. If we look
02:52 8 at the specific claims, for example, we know that the
02:52 9 claims says the "signals specifying a video file that
02:52 10 is to be acted upon..."

02:52 11 So we know signals set up the video file.

02:52 12 And then it goes on to recite that
02:52 13 there's an identification of the media player that --
02:53 14 from which content is intended to be displayed and
02:53 15 further controlled.

02:53 16 What it doesn't tell us is how the video
02:53 17 content is being identified. Nor is it telling us
02:53 18 directly where that video content is being specified
02:53 19 from or identified from.

02:53 20 And that's important because that
02:53 21 indefiniteness, which is further plagued by the way
02:53 22 that the specification uses all of these terms, these
02:53 23 various terms, interchangeably and without any
02:53 24 specification unique to video content, creates an
02:53 25 indefiniteness issue in terms of reasonable certainty

02:53 1 in to how a person skilled in the art would be able to
02:53 2 practice the scope of the invention. And specific with
02:53 3 the "video content" term, how that identification
02:53 4 occurs.

02:53 5 Can we please go on to the next slide?

02:53 6 Now, this is -- it's helpful to contrast
02:53 7 the claim language of the '251 patent which is the only
02:54 8 one where we're raising the video content
02:54 9 indefiniteness argument in comparison to the claim in
02:54 10 the '289 patent.

02:54 11 And specifically there the setup is much
02:54 12 more specific in terms of actually telling a person of
02:54 13 ordinary skill in the art how these two terms are
02:54 14 connected to each other. It tells us that one or more
02:54 15 messages specify a file to be acted upon, and that the
02:54 16 content comes from that specified file.

02:54 17 Now, notice here in particular that the
02:54 18 term "video content" is not being used nor is the term
02:54 19 "video file." Nonetheless, we know that the content
02:54 20 that is being played is -- resides in the specified
02:54 21 file because the claim's telling us.

02:54 22 So in that regard the comparison and
02:54 23 contrast between that claim and the way that the claim
02:54 24 of the '251 is set up, it's telling of the
02:54 25 indefiniteness.

02:54 1 Can we please go on to the next slide?

02:54 2 So when we look at the specification and
02:55 3 the portions of the specification that Touchstream
02:55 4 cites to attempt to resolve the ambiguity or to allege
02:55 5 that the ambiguity is resolved, when you look at the
02:55 6 actual recitations and what they say, it's clear that
02:55 7 there is no ambiguity resolved.

02:55 8 All that it's telling us is that the
02:55 9 video content is really -- it's only talking about
02:55 10 content providers, content providers that are providing
02:55 11 content in general and, not only that, content
02:55 12 providers that are just providing video files. Nothing
02:55 13 about how the video content is actually being selected
02:55 14 or how a person of ordinary skill in the art would know
02:55 15 how to select the video content that may reside in a
02:55 16 video file.

02:55 17 Can we please go on to the next slide?

02:55 18 Lastly, the important -- the last point
02:55 19 that I think is important to keep in mind is that
02:55 20 Touchstream in their response raised how a file might
02:55 21 be a container that stores content and so on, but the
02:55 22 specification never says that and there's no language
02:56 23 in the specification that actually demonstrates that.

02:56 24 So to the extent that Touchstream is
02:56 25 relying on its attorney argument to safeguard the

02:56 1 validity of the video content claim, since it has no
02:56 2 support in the intrinsic record, we submit that the
02:56 3 Court should reject those arguments as mere attorney
02:56 4 argument.

02:56 5 Thank you, Your Honor.

02:56 6 THE COURT: Thank you.

02:56 7 A response?

02:56 8 MR. DYKAL: Yes, Your Honor. Ryan Dykal.
02:56 9 I'll argue on behalf of Touchstream.

02:56 10 And can I -- I don't see any videos.
02:56 11 Google's -- are their slides still on the screen?

02:56 12 THE COURT: They're not on my screen.

02:56 13 MR. DYKAL: Okay. Maybe that's just me.
02:56 14 Okay.

02:56 15 Well, I'll try to be brief, Your Honor.
02:56 16 So two points here. One, the Supreme Court has said in
02:56 17 Nautilus that indefiniteness must be evaluated from the
02:56 18 standard of one of reasonable skill in the art. And,
02:57 19 notably, Google has not specified what they contend one
02:57 20 of skill in the art is or what that person would
02:57 21 understand.

02:57 22 And so at the outset, there's a failure
02:57 23 of proof here. And it's notable that the burden is
02:57 24 high for indefiniteness. It's a clear-and-convincing
02:57 25 standard. And without even specifying the level of

02:57 1 skill in the art or what a person of ordinary
02:57 2 understanding would view these claims and how they
02:57 3 would view them and how they would be unable to define
02:57 4 the scope of the claims, we think there's a failure in
02:57 5 the first instance to meet their burden of clear and
02:57 6 convincing evidence.

02:57 7 And our second point is really these are
02:57 8 not confusing claims. These are not technical terms
02:57 9 that would be confusing to a person of ordinary skill
02:57 10 or even a lay juror. You know, the words that they're
02:57 11 alleging are indefinite are ordinary and understood by
02:57 12 almost anyone.

02:57 13 The word "video file" is easily
02:57 14 understood. The word "video content" is understood.
02:58 15 And particularly, as Nautilus dictates, these words are
02:58 16 to be evaluated in the scope of the claims in light of
02:58 17 the specification.

02:58 18 And the claims are clear that the video
02:58 19 file is what is specified in the signal. So the signal
02:58 20 goes from the mobile device. It specifies a video file
02:58 21 to be acted on. And then video content is displayed to
02:58 22 the screen and video content can be controlled.

02:58 23 And this is not uncertain. It's
02:58 24 certainly not the level of indefiniteness. It is
02:58 25 apparent what is going on here. There is a video file

02:58 1 that is specified in the signals. Once that video file
02:58 2 is acted upon, the video content that is contained
02:58 3 within that file can be displayed to the screen. And
02:58 4 there is no ambiguity here.

02:58 5 The claims are reasonably certain, easily
02:58 6 up to the level of the standard dictated in Nautilus.
02:58 7 And the claims are not indefinite for both of those
02:58 8 reasons.

02:58 9 Thank you.

02:59 10 THE COURT: Rebuttal?

02:59 11 MR. GARCIA: Yes, Your Honor.

02:59 12 As to the first one regarding the person
02:59 13 of ordinary skill definition. There is no precedent,
02:59 14 controlling precedent, from the Federal Circuit or the
02:59 15 Supreme Court that requires that every court examining
02:59 16 112 issues or claim construction, that they must
02:59 17 ascertain -- they must delineate at the outset the
02:59 18 level of skill of the art.

02:59 19 What is required is to review the
02:59 20 disclosures of the specification and ascertain if the
02:59 21 claims are -- would be properly understood by one
02:59 22 skilled in the art.

02:59 23 As it relates to the technicality -- or
02:59 24 the points about technicality of the terms and whether
02:59 25 they are easily understood or not, I think it, again,

02:59 1 it's telling to go back to the specification and look
02:59 2 at the variations and the numerous variations of how
02:59 3 these terms are being used.

02:59 4 Video content is never there. Now, the
02:59 5 word "content" appears on its own. The word "video"
02:59 6 appears on its own. The word "video data" appears on
02:59 7 its own. The word "data file" appears on its own. The
02:59 8 word "video data file" appears on its own.

03:00 9 So the point is, Your Honor, when you go
03:00 10 back to the specification and you truly go through how
03:00 11 these disclosures are going on, it's very telling that
03:00 12 the word -- the video content is not being delineated
03:00 13 within the term -- the way that the claims are set up.

03:00 14 The more important point is that there's
03:00 15 no indication of how that content is being selected in
03:00 16 the '251 patent claim the way that they are in the '289
03:00 17 patent. So I think the comparison between how those
03:00 18 two claims are drafted is telling enough.

03:00 19 Thank you, Your Honor.

03:00 20 THE COURT: You bet. I'll be back in one
03:00 21 second.

03:02 22 (Pause in proceedings.)

03:02 23 THE COURT: Thank you all.

03:02 24 The Court is going to maintain its
03:02 25 preliminary construction. I don't believe it's

03:02 1 indefinite.

03:02 2 The next claim term is "unique
03:02 3 identification code." Who will be arguing that?

03:02 4 MR. LANIER: I will, Your Honor. Greg
03:02 5 Lanier of Jones Day.

03:02 6 Thank you for the time in this busy week.

03:03 7 Mr. McLean, if we could put up Slide 8,
03:03 8 please.

03:03 9 So we've illustrated here, Your Honor,
03:03 10 where the two terms that we're taking together here,
03:03 11 "unique identification code" and "synchronization
03:03 12 code," appear in Claim 1 of each of the two of the
03:03 13 asserted patents.

03:03 14 The issue here isn't the meaning of
03:03 15 either of those terms. It is who assigns them. And I
03:03 16 put up all this claim language just to illustrate that
03:03 17 this assignment is done as part of a complex system or
03:03 18 method, depending on the particular claims, that has a
03:03 19 lot of moving parts. A lot of different things are
03:03 20 done by different parts of the system.

03:03 21 And so it's not about what these things
03:03 22 are, but who assigns them.

03:03 23 If we could go to the next slide, Slide
03:03 24 9, if you're looking at a hard copy.

03:03 25 So there's really two issues here, Your

03:04 1 Honor, to focus in on our argument. The first is that
03:04 2 there is no disclosure in the specification -- in the
03:04 3 claims themselves. If you look at the language of the
03:04 4 claims, to us, it seems very clear that the server
03:04 5 system is always assigning either the unique
03:04 6 identification code or the synchronization code.

03:04 7 When you go to the specification, it is
03:04 8 also crystal clear to us that only the server system is
03:04 9 assigning that. And we put some exemplar specification
03:04 10 language up here.

03:04 11 Now, in response, Touchstream makes two
03:04 12 points. The first is a legal point. Liebel-Flarsheim
03:04 13 and that line of cases, but you can't just limit us --
03:04 14 we haven't disavowed anything beyond that just because
03:04 15 there's no express words of disavowal, et cetera.

03:04 16 But this is not a situation where the --
03:04 17 you can learn from the patent of any other way of
03:04 18 practicing these claims. Nothing else in it is taught,
03:04 19 nothing else is disclosed, no other claims disclose
03:04 20 anything. Nothing -- there is no discussion of any
03:05 21 other alternative embodiment where anything other than
03:05 22 the server system does the assignment.

03:05 23 So this isn't a disavowal or disclaimer
03:05 24 situation. This is more like GPNE where the only thing
03:05 25 that is taught to help you understand the claim is this

03:05 1 particular method of operation that has multiple
03:05 2 embodiments, where the server system does the
03:05 3 assignments.

03:05 4 If we could go to the next slide.

03:05 5 The next point is that -- that
03:05 6 Touchstream makes is that, well, there are some
03:05 7 discussion of whether the server system uses the IP
03:05 8 address or a MAC address occasionally in some examples,
03:05 9 as opposed to creating a new sync code.

03:05 10 But that's a distraction, Your Honor.
03:05 11 That's not actually the issue. Because the question
03:05 12 here is not what does the server system choose to use
03:05 13 to say you are the thing to which I'm going to send
03:05 14 things, whether -- and whether it borrows that number
03:05 15 from something else. It is who does the assigning?

03:06 16 And I thought an analogy might help.
03:06 17 This being June, it's baseball season. If I were lucky
03:06 18 enough to manage the San Francisco Giants, for example,
03:06 19 I'd fill up my lineup card and I'd say my first baseman
03:06 20 is going to lead off.

03:06 21 Now, I could write next to Slot No. 1
03:06 22 first baseman. I could write Brandon Belt. I could
03:06 23 write No. 9.

03:06 24 Now, first baseman and No. 9 are things
03:06 25 that I, as the manager of the team, assigned to that

03:06 1 thing who's going to stand there, that person who's
03:06 2 going to bat first and stand at first base. Brandon
03:06 3 Belt's name was given to him presumably by his parents
03:06 4 way long ago.

03:06 5 The fact that it doesn't matter for
03:06 6 purposes of filling out that lineup card, in that
03:06 7 system I am using that as his unique identifier.

03:06 8 So the question isn't where did the
03:06 9 unique identifier label come from? It's that I, the
03:06 10 server system, I'm the one who's assigning it.

03:06 11 So that's our argument truly, Your Honor,
03:06 12 in a nutshell. If we recognize that what the digit or
03:07 13 numbers or symbols of the unique identification code or
03:07 14 synchronization code might be is not the question. But
03:07 15 that who chooses that that is the unique identification
03:07 16 code or synchronization code, that's the question.

03:07 17 Then I think that Touchstream's
03:07 18 opposition falls. It's not a Liebel-Flarsheim
03:07 19 situation. There's no other embodiments disclosed.
03:07 20 And that the Court's construction respectfully should
03:07 21 include the note that the unique identification code
03:07 22 and synchronization code are assigned by the server
03:07 23 system to the content presentation device.

03:07 24 And I'll stop there.

03:07 25 THE COURT: A response?

03:07 1 MR. LAROQUE: Yes. Thank you, Your
03:07 2 Honor. Sam LaRoque on behalf of Touchstream.

03:07 3 We agree with the Court that the plain
03:07 4 and ordinary meaning should control here. That sync
03:07 5 code, synchronization code, is assigned to the content
03:07 6 presentation device means just that. The
03:07 7 synchronization code is assigned to the content
03:08 8 presentation device. And we don't need to read in
03:08 9 anything further that says who does the assigning.

03:08 10 A couple of points responsive to
03:08 11 Mr. Lanier. First, you know, the -- we think about
03:08 12 what the synchronization code is intended here to do.
03:08 13 The synchronization code is provided to the server
03:08 14 system in a message from the content presentation
03:08 15 device. And ultimately it is used as an association,
03:08 16 to set up an association between the personal computing
03:08 17 device, the mobile phone for instance, and the content
03:08 18 presentation device.

03:08 19 It's that association that is claimed.
03:08 20 It doesn't matter for purposes of associating the
03:08 21 personal computing device with the content presentation
03:08 22 device, what does that assignment, what actually
03:09 23 assigned that code. And the specification does not
03:09 24 suggest otherwise.

03:09 25 To look at the language that Mr. Lanier

03:09 1 quoted from the specification, it starts with "for
03:09 2 example, in some implementations the synchronization
03:09 3 code is generated randomly and assigned to the display
03:09 4 device each time it connects to the server system."

03:09 5 That's very permissive language. That
03:09 6 doesn't evidence any intent on the patentee's part to
03:09 7 limit this claim to assignment by the server system.

03:09 8 And I would also point out, Your Honor,
03:09 9 that there are -- there are other independent claims in
03:09 10 the '289 patent in particular, one of the three patents
03:09 11 asserted in this case, and one of the patents asserted
03:09 12 here, where the independent claims actually do recite
03:09 13 that the synchronization code is assigned by the server
03:09 14 system to the content presentation device.

03:10 15 But the claims, the independent claims,
03:10 16 of the '289 patent that Touchstream is asserting,
03:10 17 Claims 1 and 6, do not include that additional
03:10 18 limitation that assignment must be by the server
03:10 19 system. So where patentee intended for it to be by the
03:10 20 server system, he said so. But in the asserted claims
03:10 21 and in the term before the Court, he did not say so.
03:10 22 And there is no reason to interpret it so broadly.

03:10 23 So we agree with Your Honor's preliminary
03:10 24 plain and ordinary meaning construction.

03:10 25 Thank you.

03:10 1 THE COURT: A reply?

03:10 2 MR. LANIER: Very briefly, Your Honor.

03:10 3 And thank you again for the time.

03:10 4 Three points. First is, it sounds like
03:10 5 that argument was an attempt to resurrect part of what
03:10 6 had been Touchstream's alternative proposal,
03:10 7 alternative plain language meaning.

03:10 8 So if the Court is not inclined to accept
03:10 9 the construction that Google has proposed, we do not
03:10 10 believe that there's any basis to conflate
03:10 11 "association" and "assignment." Those are different
03:10 12 words used for different purposes at different places
03:11 13 in the claims. And so association isn't the issue for
03:11 14 this construction.

03:11 15 So if it is not going to be -- if the
03:11 16 Court is not going to say the unique identification
03:11 17 code is assigned by the server system, it should not
03:11 18 include the other language that Touchstream had
03:11 19 previously included and was not in the Court's
03:11 20 preliminary construction. That's point one.

03:11 21 Point two. I think if we look at the
03:11 22 same language, and rather than pulling up the slide,
03:11 23 I'll just direct the Court to -- on considering this --
03:11 24 to the '251 patent at Page -- or Column 5, Lines 27 to
03:11 25 35.

03:11 1 In every one of those examples, it is
03:11 2 actually clear that what's at issue is not who's doing
03:11 3 the assignment -- assigning, but what the server system
03:11 4 chooses to use as that unique code.

03:11 5 First, "in some implementations the
03:11 6 synchronization code is generated randomly and assigned
03:11 7 to the delay device each time it connects to the server
03:11 8 system."

03:12 9 The second sentence emphasizes that this
03:12 10 isn't a question about the IP address or the MAC
03:12 11 address because they're all different things. Even if
03:12 12 you happen to use one for the other, they're different
03:12 13 things that play a different role in the system.

03:12 14 And the third thing, for example, is the
03:12 15 same set of language. This information can be stored,
03:12 16 for example, in a look-up table in the server system.

03:12 17 So there's no disclosure anywhere of the
03:12 18 assignment, which is the key, not association,
03:12 19 assignment of the unique identification code or
03:12 20 synchronization code other than by the server system.

03:12 21 So I'll stop there, Your Honor. I think
03:12 22 everything else is in the papers. Thank you.

03:12 23 THE COURT: If I could hear a rebuttal
03:12 24 just to the final point that counsel just made.

03:12 25 MR. LAROQUE: Thank you, Your Honor.

03:12 1 Again, we read this claim -- this
03:12 2 language in the specification differently. It just
03:12 3 says that: In some implementations the synchronization
03:12 4 code is generated randomly and assigned to the display
03:13 5 device each time it connects to the server system.

03:13 6 It does not say that that's the only way
03:13 7 that the synchronization code can ever be assigned or
03:13 8 that the server is the only entity that ever does that
03:13 9 assignment.

03:13 10 And as we said in the papers, the
03:13 11 specification clearly contemplates that that code might
03:13 12 be the IP address, that it might be the MAC address.
03:13 13 And Google's own extrinsic evidence that it presented
03:13 14 in this case makes clear that neither the IP address
03:13 15 nor the MAC address typically would be assigned by the
03:13 16 server system.

03:13 17 And I'll leave it at that. Thank you,
03:13 18 Your Honor.

03:13 19 THE COURT: Anything else?

03:13 20 MR. LANIER: Only the last two sentences,
03:13 21 Your Honor, that the server system might choose to use
03:13 22 the IP address as the synchronization code to play the
03:13 23 unique role of the synchronization code in that system
03:13 24 doesn't mean that whoever gave that IP address is doing
03:13 25 the assignment. It's the server system.

03:14 1 So it's not the question of who assigned
03:14 2 the numbers one, two, three, four, however IP addresses
03:14 3 are structured. Your Honor's seen that. It's not who
03:14 4 named it, it's who decided that's the thing that is
03:14 5 used as the unique identification code or
03:14 6 synchronization code.

03:14 7 That's all we have, Your Honor. Thank
03:14 8 you.

03:14 9 THE COURT: Anything else from plaintiff?

03:14 10 MR. LAROQUE: No. Nothing further, Your
03:14 11 Honor.

03:14 12 THE COURT: Okay. I'll be right back.

03:14 13 (Pause in proceedings.)

03:16 14 THE COURT: If we can go back on the
03:16 15 record.

03:16 16 The Court is going to maintain its
03:16 17 preliminary construction.

03:16 18 The final claim term is "action control
03:16 19 command being independent of the particular media
03:16 20 player." And I'll hear from the defendant.

03:16 21 MR. LANIER: Thank you, Your Honor.
03:16 22 Mr. McLean is going to briefly and slowly walk you
03:16 23 through that one.

03:16 24 THE COURT: You'll understand if I'm
03:16 25 skeptical.

03:16 1 MR. LANIER: Understood, Your Honor.

03:16 2 MR. MCLEAN: Thank you, Your Honor. I'm
03:16 3 just trying to bring the slides back up hear.

03:17 4 Okay. Thank you again, Your Honor.

03:17 5 The term here is "action control command
03:17 6 being independent of the particular media player." And
03:17 7 while we understand the Court's tentative construction
03:17 8 was plain and ordinary meaning, given the Court's
03:17 9 constructions, we attempted to refine this construction
03:17 10 to something that provided more of a middle ground.

03:17 11 And really what we're going for here
03:17 12 primarily is that the command is a standard command
03:17 13 independent of the particular media player.

03:17 14 So the focus here now is really the fact
03:17 15 that it's a standard command. And that's language that
03:17 16 you might find familiar, given some of the other
03:17 17 constructions that have happened in this case so far.

03:17 18 And, again, one of the issues we
03:17 19 understand that Touchstream had with Google's prior
03:17 20 construction was that it was a standard format. So we
03:17 21 revised it to be a standard command rather than a
03:17 22 format to help alleviate any issues with the language
03:17 23 there.

03:17 24 THE COURT: Can you all give me just one
03:17 25 second? I'll be right back. I just need to ask my

03:18 1 clerk something. I'll be right back.

03:18 2 MR. MCLEAN: Yep. No problem.

03:18 3 (Pause in proceedings.)

03:18 4 THE COURT: Okay. Thank you all. I'm
03:18 5 sorry to interrupt you.

03:18 6 MR. MCLEAN: No problem. Thank you, Your
03:18 7 Honor.

03:18 8 We can move on to the next slide here.

03:18 9 With respect to the claim language itself
03:18 10 and -- which is consistent with the specification, what
03:18 11 happened here on the claim is that the server system
03:18 12 received the action control command from the personal
03:19 13 computing device, but the media player at the content
03:19 14 presentation device, which is actually used to display
03:19 15 the video file is unable to understand or utilize the
03:19 16 incoming action control command.

03:19 17 With that in mind, the claim here does
03:19 18 provide two different types of commands or information.
03:19 19 That is the action control command, which is the
03:19 20 incoming command from the personal computing device,
03:19 21 and the programming code, which is -- which is the code
03:19 22 that is a translator converted from the action control
03:19 23 command.

03:19 24 However, as can be seen in the claim
03:19 25 language, both of these terms are described in the

03:19 1 claim itself in very, very similar terms.

03:19 2 For example, the action control command
03:19 3 is utilized "for presentation of the content on the
03:19 4 content presentation device by the particular media
03:19 5 player."

03:19 6 Similarly, the programming code, which is
03:19 7 highlighted in green here, is "for controlling
03:19 8 presentation of the content by the content presentation
03:19 9 device using the particular media player."

03:20 10 And what's clear here is that the term
03:20 11 that we are talking about here, that is the "action
03:20 12 control command" being independent of a "particular
03:20 13 media player," was actually added during prosecution by
03:20 14 the applicant pursuant to discussions with examiner in
03:20 15 order to gain issuance of the patent.

03:20 16 And in doing so, the examiner and the
03:20 17 applicant decided that it was needed to differentiate
03:20 18 the action control command from the programming code.

03:20 19 Google's construction here is consistent
03:20 20 with that focus, that it's for differentiating the
03:20 21 action control command to the particular media player.

03:20 22 Again, this is from the prosecution
03:20 23 history. And the claim was allowed because the
03:20 24 applicant clarified that the action control command was
03:20 25 independent of a particular media player and that was

03:20 1 the primary reason for issuance of this patent here.

03:20 2 Accordingly, the patent examiner thought
03:20 3 that this limitation was very important for issuance of
03:20 4 the patent. And now, Google here merely seeks to
03:21 5 further clarify this limitation more for the jury to
03:21 6 understand the distinction.

03:21 7 Notably, the specification never actually
03:21 8 uses the term "action control command." And the first
03:21 9 time it shows up is in the actual claims themselves.

03:21 10 And as Your Honor likely recognizes, when
03:21 11 he construed the term "for" here, which we're not
03:21 12 arguing today but was in the tentative constructions
03:21 13 for "universal command," "standard command" and
03:21 14 "universal command" were used interchangeably in the
03:21 15 specification.

03:21 16 And here's some of the language here with
03:21 17 "standard" highlighted in green, which is really
03:21 18 defining this command that is being passed from,
03:21 19 again -- or received by the server system from the
03:21 20 personal commuting device.

03:21 21 And, again, as perhaps more notably in
03:21 22 the Court's tentative, the Court construed "universal
03:21 23 command" which was a term -- Term 4 in the tentative
03:21 24 from the '251 patent, as a standard command.

03:21 25 Again, these are really representing two

03:22 1 of the same things here. One using action control
03:22 2 command, the other one using universal command. But
03:22 3 again, the specification uses the word "standard" in
03:22 4 defining sort of both of these terms here.

03:22 5 So really what happens here is the
03:22 6 specification, both the parties have now used standard
03:22 7 command for this term. The Court has now also used it
03:22 8 as well.

03:22 9 And therefore Google submits that this
03:22 10 term should also be used to provide standard command
03:22 11 for consistency, given that courts typically like to
03:22 12 have consistency across the claims. And as shown here
03:22 13 by the Court's order quoting Phillips, other claims
03:22 14 asserted, unasserted can provide additional
03:22 15 instructions because terms are normally used
03:22 16 consistently throughout the patent.

03:22 17 And, again, this isn't a case where
03:22 18 Google's trying to, you know, read in a term from the
03:22 19 specification. Instead, you know, this is Google
03:22 20 trying to clarify the construction of the term which
03:22 21 was deemed important by the examiner during
03:23 22 prosecution.

03:23 23 And it's further distinguishing the
03:23 24 action control command in the corresponding programming
03:23 25 code for this term, and which we think will be helpful

03:23 1 for the jury.

03:23 2 Thank you very much.

03:23 3 THE COURT: Thank you very much.

03:23 4 A response?

03:23 5 MR. LAROQUE: Yes. Thank you, Your
03:23 6 Honor. Several points.

03:23 7 First, we agree with the Court's plain
03:23 8 and ordinary meaning preliminary construction. We
03:23 9 don't see any need to read in any additional words
03:23 10 about a standard command to clarify this distinction
03:23 11 between the action control command and the programming
03:23 12 code. We think that's already clear from the plain
03:23 13 language of the claim.

03:23 14 We have an action control command that is
03:23 15 independent of the particular media player. And the
03:23 16 claim goes on to say that you then identify programming
03:23 17 code that corresponds to that action control command.
03:23 18 Or actually controlling presentation of content on the
03:23 19 content presentation device.

03:23 20 So it's already clear from the plain
03:24 21 language of the claim that the action control command
03:24 22 is distinct from the programming code. And we don't
03:24 23 see any need to read in any additional language beyond
03:24 24 the plain and ordinary meaning of those words.

03:24 25 To the point of, you know, reading in

03:24 1 this limitation about a standard command, we don't
03:24 2 dispute Google counsel's assertion that for the term
03:24 3 "universal command" we did propose a construction that
03:24 4 includes the term "standard command."

03:24 5 But importantly, the term "universal
03:24 6 command" does not appear here. That is not claimed in
03:24 7 the '289 or '528 patents. That's a term that was in a
03:24 8 different patent, in the '251 patent.

03:24 9 And the universal command in the patent
03:24 10 specification is also described as a standard command.
03:24 11 So in clarifying in our proposed construction for a
03:24 12 different patent in a different claim term what a
03:24 13 universal command is, we proposed the term "standard
03:25 14 command."

03:25 15 But there's no reason or need to read
03:25 16 standard command into this term, into action control
03:25 17 command. The specification, the patent specification,
03:25 18 describes more broadly a command that's included in a
03:25 19 message from the personal computing device that is for
03:25 20 controlling playing of the content on the display
03:25 21 device, for instance. It doesn't say anything about
03:25 22 that being a standard command.

03:25 23 So, again, in the absence of any, you
03:25 24 know, unequivocal disclaimer, lexicography, we agree
03:25 25 with the Court's preliminary construction that plain

03:25 1 meaning should control here. And there's no reason to
03:25 2 read anything further into this term "action control
03:25 3 command" independent of the particular media player.

03:25 4 Thank you.

03:25 5 THE COURT: A rebuttal?

03:25 6 MR. MCLEAN: Thank you, Your Honor. Just
03:25 7 real briefly.

03:25 8 It is true that one patent has the term
03:26 9 "universal command" while the other has "action control
03:26 10 command." But it's also clear that both patents are
03:26 11 using that term in the same context. They're both the
03:26 12 command that's being received by the server system and
03:26 13 then translator converted into the programming code
03:26 14 which is provided to the media player for playback
03:26 15 purposes.

03:26 16 In both cases it's talking about the
03:26 17 exact same command. The spec does not reference a
03:26 18 action control command. As we mentioned earlier, the
03:26 19 first time it shows up is in a complaint that might
03:26 20 refer -- in the claim. Excuse me.

03:26 21 It might refer to command in the
03:26 22 specification. But, again, it's not an action control
03:26 23 command. So it's a little unclear where that language
03:26 24 is stemming from. But it's also clear that the spec
03:26 25 consistently refers to universal or standard command.

03:26 1 And the case here, it would be consistent
03:26 2 with the construction for -- that Your Honor made for
03:26 3 the "universal command" term, to also include
03:26 4 "standard" with respect to the action control command
03:26 5 here.

03:26 6 Thank you, Your Honor.

03:26 7 THE COURT: Anything else?

03:27 8 MR. LAROQUE: Thank you, Your Honor.
03:27 9 Just very briefly.

03:27 10 To reiterate again that the term
03:27 11 "universal command" is used interchangeably with
03:27 12 "standard command" in a particular embodiment.

03:27 13 And then universal command is claimed in
03:27 14 the '251 patent but not the '289. The '289 and '528
03:27 15 use the term "action control command." And these
03:27 16 commands are described more broadly elsewhere in the
03:27 17 specification. So there's no need to limit them here
03:27 18 to universal or standard commands.

03:27 19 Thank you.

03:27 20 THE COURT: I'll be back in a second.

03:27 21 (Pause in proceedings.)

03:28 22 THE COURT: Thank you very much for the
03:28 23 break.

03:28 24 I'm going to maintain my preliminary
03:28 25 construction.

03:28 1 Is there anything else we need to take
03:28 2 up?

03:28 3 MR. LANIER: Not for Google, Your Honor.

03:28 4 MR. DYKAL: Nothing for Touchstream, Your
03:28 5 Honor. Thank you for your time.

03:28 6 THE COURT: You bet. It takes a day of
03:28 7 sentencing over 30 people to make you really want to
03:29 8 cuddle up with a good Markman hearing.

03:29 9 (Laughter.)

03:29 10 THE COURT: And so I know, you know,
03:29 11 it's -- I have to say, it's been a while since I felt
03:29 12 really grateful to go have a Markman hearing, but I did
03:29 13 today and it's always nice when you have really good
03:29 14 lawyers too.

03:29 15 So you guys have a good afternoon. I
03:29 16 hope to see y'all soon. Take care.

03:29 17 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of
6 Texas, do certify that the foregoing is a correct
7 transcript from the record of proceedings in the
8 above-entitled matter.

9 I certify that the transcript fees and format comply
10 with those prescribed by the Court and Judicial
11 Conference of the United States.

12 Certified to by me this 13th day of October 2022.

13
14 /s/ Kristie M. Davis
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